Linda Lewis and Roger Weekly, Individually and as a Partnership, d/b/a Iron Griddle Restaurant *and* Lynette Ferrari. Case 6–CA–28767

July 29, 1998

ORDER REMANDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On October 16, 1997, Administrative Law Judge James L. Rose issued his decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited exception and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found that the Respondent violated Section 8(a)(1) of the Act by discharging the Charging Party, Lynette Ferrari, for engaging in protected concerted activity. Specifically, the judge found that majority partner Linda Lewis had discharged Ferrari at the close of her shift on January 23, 1997, because of Ferrari's request that day on behalf of herself and another waitress for pay for time spent setting up before the restaurant opened. He specifically discredited Lewis testimony that she discharged Ferrari for insubordination, namely for her refusal to report to her, as she had requested, at the end of Ferrari's shift on the previous day. In support of his credibility determination, the judge noted that the ''alleged act of insubordination was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation [claim] nor testified to by Lewis at the unemployment compensation hearing.'' He concluded that ''Ferrari's alleged insubordination . . . was not advanced before the Commonwealth because it did not happen.''

The Respondent has excepted to the judge's decision primarily on grounds that the judge made incorrect credibility findings. Specifically, the Respondent contends that the judge erred in holding that insubordination was not advanced before the Unemployment Compensation Board as a reason for Ferrari's discharge. We have reviewed the record in light of the exceptions and briefs and find merit in this contention.

Neither the Respondent nor the General Counsel entered the transcript of the unemployment compensation hearing as an exhibit in the instant proceeding. The General Counsel entered as exhibits, however, decisions of April 25 and June 24, 1997, made by the Pennsylvania Unemployment Compensation Board regarding Ferrari's claim for benefits. In the earlier decision, a referee affirmed the determination of the Office of Employment Security to award unemployment benefits to Ferrari. In the later decision reversing the referee's order, however, a three-member panel specifically found, inter alia, '' employer's testimony credible that the claimant was instructed to report to the employer at the end of her shift, and refused to.''[1] In addition, Ferrari testified in the instant unfair labor practice hearing that ''the first [she] ever knew'' about the assertion that Nichols had asked her to report to Lewis on January 22 was at the hearing held by the Unemployment Compensation Board on March 19.

In these circumstances, we are remanding this case to the judge to reconsider his credibility determinations and to prepare a supplemental decision in light of the erroneous basis he asserted for discredting Lewis' testimony.[2] We find it unnecessary at this time to pass on the Respondent's other exceptions or on the General Counsel's limited exception to the judge's decision.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge James L. Rose for the limited purpose described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a Supplemental Decision setting forth the resolution of credibility issues, findings of fact, conclusions of law and recommendations, including a recommended order, in light of the issue on remand. Copies of the Supplemental Decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall apply.

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I find it unnecessary to remand this case to the judge to reconsider his credibility determinations. Even assuming that one of the reasons for the judge's discrediting of Linda Lewis was erroneous, I find the judge had sufficient, correct, and independent reasons for his credibility resolution.

The judge found that Lewis discharged employee Ferrari at the close of her shift on January 23, 1997, because of Ferrari's request earlier that day on behalf of herself and another employee for pay for time spent

[1] The panel's reversal did not address Ferrari's undisputed request to discuss receiving pay for work performed before the restaurant opened.

[2] Contrary to our dissenting colleague, we think it unwarranted simply to assume that the judge's finding concerning the limits of the Respondent's defense in the unemployment compensation hearing had no effect on his ultimate conclusion concerning the credibility of Lewis's testimony. In his summary paragraph, in which he concludes that ''Lewis attempted to mislead me on a material fact,'' the judge found that the ''alleged insubordination'' was only belatedly conceived, when the Respondent was looking for a defense to the unfair labor practice charge. The point on which we are remanding bears directly on that finding.

setting up before the restaurant opened. In so finding, the judge discredited Lewis' testimony that she discharged Ferrari for her insubordination in refusing to report to Lewis, as requested, at the end of Ferrari's shift on the previous day.

The judge explained his discrediting of Lewis testimony as ''based in part on demeanor but also on the inherent unreasonableness and internal inconsistency of Lewis' testimony on certain critical facts.'' (ALJD 3:13–14) As my colleagues emphasize, the judge pointed to the fact that Lewis did not testify about the insubordination at the unemployment compensation hearing. However, he also pointed to the undisputed facts that the insubordination was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation. He further relied on the admitted fact that insubordination was not mentioned in a paper offered into evidence by Lewis as containing a list of Ferrari's faults which Lewis claimed she intended to read to Ferrari when discharging her. These grounds, in addition to the judge's observation of demeanor, are sufficient to find that the record supports his credibility determination. The judge' error in finding that insubordination was not advanced before the Commonwealth at the unemployment compensation hearing does not affect his other reasons for discrediting Lewis. I would not waste the resources of this agency by remanding this case to the judge to reconsider his credibility resolutions in such circumstances.

David G. Shepley, Esq., for the General Counsel.
Thomas G. Lemons, Esq., of McMurray, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Waynesburg, Pennsylvania, on August 5, 1997,[1] upon the General Counsel's complaint which alleged that on January 23, the Respondent discharged Lynette Ferrari and committed other violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that Ferrari was discharged for cause.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order

I. JURISDICTION

The Respondent is a partnership jointly owned by Linda Lewis and Roger Weekly engaged in the operation of a family restaurant in Waynesburg, Pennsylvania, in which it annually has gross revenues in excess of $500,000 and annually purchases and receives goods valued in excess of $50,000 from other enterprises, including Sysco, Inc., located within the Commonwealth of Pennsylvania, each of which enterprises had received these goods directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Linda Lewis and Roger Weekly took over ownership of the Iron Griddle Restaurant on May 22, 1995, prior to which it had been owned and operated by John Christopher. Lewis is the principal managing partner. Weekly has another full-time job thus his active involvement is limited to the evening shift.

Lynette Ferrari began working for the restaurant as a waitress in 1994. She was discharged on January 23, at which time she worked the early morning shift—6 a.m. to 1 p.m. She, and the others on the early shift, typically arrived at about 5:30 a.m. in order to make coffee and do other preparatory activity.

In February 1996 Lewis had a timeclock installed. Ferrari asked about punching in before 6 a.m. in order to do the preparatory work and Lewis gave the early employees permission to punch in at 5:45 a.m. However, as Ferrari testified, she was never paid for 15 minutes between 5:45 and 6 a.m. The timeclock was taken out in December 1996.

The events leading to Ferrari's discharge began on January 22. Ferrari overslept that morning, and as a result was 3 to 5 minutes late for work. Although her husband had called in about 5:30 a.m. to say that she was running late but would be there shortly, and Ferrari had never been late before, this infuriated Lewis and on Ferrari's arrival, Lewis reprimanded her. Ferrari in turn was upset, particularly as she was not being paid for time before 6 o'clock, and she called her husband to see what had been said when he called the restaurant. This then resulted in Dennis Ferrari coming to the restaurant about 8:30 a.m. asking to talk to Lewis. She refused and there was a minor confrontation between Dennis Ferrari, Lewis, and Lewis' son.

While this was not assigned by the Respondent as the reason for discharging Ferrari the next day (counsel for the Respondent stating that it was down on the list), it did motivate Ferrari to learn of her rights from the National Labor Relations Board and the Commonwealth unemployment office. Thus at about 12:45 p.m. on January 23 she told her supervisor, Melva Custer (then Nichols) that she needed to leave promptly at 1 p.m. when her shift ended as she had ''some place I have to go. And she said no problem.'' A few minutes before 1 p.m. Custer said business was slow enough they could count the tips, they did so and Ferrari left.

Ferrari made contact with the various agencies and later on January 22 called Phyllis Steves, who also worked the morning shift, to say that she could make a claim for the 15 minutes and could not be fired, but she had to include another employee. Steves said to use her name, that she wanted to be paid as well.

Thus on January 23 Ferrari saw Lewis about 6:30 a.m. said to her, ''me and Phyllis would like to talk to you about

[1] All dates are in 1997 unless otherwise indicated.

our starting time and about getting paid for that fifteen minutes.'' To which, Ferrari testified, Lewis responded, ''If you want to push this, I will lay you off. I said Linda, me and Phyllis just want to talk to you about our starting time and about getting paid for that 15 minutes. She said I'll talk to you alone. I'll talk to Phyllis alone, but, I will not talk to you two together. She says, and I'll pay you for five minutes and no more, and I do mean it Lynn, if you want to push this, I will lay you off.''

At the end of her shift that day, Ferrari was called into Lewis' office and was terminated.

This summary of the facts is based on the credited testimony of Ferrari. Where there are factual disputes between Ferrari and Lewis I credit Ferrari and discredit Lewis. This is based in part on demeanor but also on the inherent unreasonableness and internal inconsistency of Lewis' testimony on certain critical facts.

Although Lewis testified that Ferrari's overall attitude from the beginning led to the termination, it was her refusal to see Lewis at the end of her shift on January 22 which was critical. Lewis testified that she told Custer to tell Ferrari to come to her office at the end of the shift. Custer testified that when relaying this order Ferrari declined, saying she had an appointment and had to leave right after work and Custer so informed Lewis. However this alleged act of insubordination was not given as a reason on any of the forms Lewis filled out in defense of Ferrari's unemployment compensation nor testified to by Lewis at the unemployment compensation hearing. Lewis offered into evidence a paper on which she had written a list of Ferrari's many faults and which she claims she intended to read to Ferrari when discharging her. Not meeting with Lewis on January 22 was not listed. She justified this omission saying ''It was kind of a moot point by then.'' So, of course, were Ferrari's other alleged faults.

I conclude that Ferrari was not called to see Lewis on January 22 as testified to by Lewis and Custer. To the contrary, I credit Ferrari that Custer did not tell her to meet with Lewis after the shift, rather about 15 minutes before the end of the shift she told Custer that she needed to leave promptly at 1 p.m. and Custer said that would be no problem. Ferrari's version is corroborated by then cashier Heidi Conard who is no longer an employee and has no apparent stake in the outcome of this matter.

I believe that Ferrari's alleged insubordination on January 22 was not advanced before the Commonwealth as a reason for her discharge because it did not happen. I conclude that the alleged insubordination was conceived only after Lewis learned that to avoid liability under the Act she needed to have made the discharge decision prior to Ferrari engaging in protected concerted activity. In short, I conclude that Lewis attempted to mislead me on a material fact.

B. *Analysis and Concluding Findings*

1. The discharge of Lynette Ferrari

It is well settled that initiating a discussion about wages with an employer is protected activity. It is also well settled that where an employee brings to an employer's attention a matter of protected concern on behalf of one or more fellow employees, it is concerted within the meaning of Section 7. Thus if, as I conclude, Ferrari sought to discuss the matter of being compensated for the 15 minutes before shift with Lewis on behalf of herself and Steves, she was engaged in protected concerted activity. And if, as I conclude, she was discharged for this reason, the Respondent violated Section 8(a)(1) of the Act. *Woodline Motor Freight*, 278 NLRB 1141 (1986).

There is no doubt Ferrari sought to discuss the wage matter with Lewis on the morning of January 23 on behalf of Steves and herself. Indeed, Lewis so admits. The only question is whether this caused her discharge or whether, as the Respondent contends, the decision to discharge Ferrari was made on January 22 and was independent of wage issue discussion.

Considering the timing of Ferrari's discharge with her attempt to discuss the pay issue with Lewis, and her tenure and competency as an employee, I conclude that the General Counsel made out a prima facie case of a violation. It therefore devolved on the Respondent to establish that Ferrari would have been discharged notwithstanding her engaging in protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st. Cir. 1981). I further conclude that the Respondent failed to carry its burden.

The Respondent's characterization of Ferrari as being a substantial problem employee from the beginning of the Lewis/Weekly ownership is simply not persuasive. Weekly testified that he recommended as early as October 1996 that Ferrari be terminated and Custer testified that she also recommended Ferrari's discharge in early January. Lewis brought forth many documents by which she sought to prove the continuing problems she had with Ferrari, yet she never gave Ferrari any kind of a discipline. (The one written reprimand in Ferrari's file related to dirty shoes and was given by the previous owner.) Lewis and Weekly admitted that employees are regularly discharged for various reasons. Ferrari was not.

The Respondent offered into evidence a ''Performance Warning'' Ferrari had signed the day she was hired by the previous employer. The purported original offered into evidence had a very light check mark by ''Attitude toward coworkers, petty bickering, gossiping.'' I doubt this check mark was in the document at the time Ferrari signed it or when Lewis and Weekly bought the restaurant. It simply does not make sense that Ferrari would be given a performance warning on her very first day of work. Rather, I conclude that the document was a means by which employees acknowledged the areas in which they would be evaluated and that someone on behalf of the Respondent, at a later time, added the check-mark. This is not particularly important of itself, but it is consistent with the Respondent's attempt to portray Ferrari's entire employment history in as unfavorable light as possible.

Lewis and Weekly both testified that as bad an employee as Ferrari was, the final ''straw'' was her refusing to meet with Lewis on January 22. Lewis testified that she probably would have terminated Ferrari on January 22, but may have only given her a reprimand. ''I had a written reprimand for her that day. But, if she gave me any spark that she was sorry, or that she could change; but I didn't hold out much hope for it, but she eliminated any hope on the 22nd when she didn't show up.'' Thus, according to Lewis, the discharge decision was made before Ferrari engaged in any protected concerted activity, and before their discussion on January 23. I am not persuaded. Indeed, I simply do not believe

Lewis. Had she in fact asked to see Ferrari at the end of her shift on January 22 to give her a written reprimand, I find it more probable than not that Lewis would still have the document. She kept everything else associated with Ferrari's employment. Lewis testified that the threw the reprimand away.

Further, had it been the events of January 22, rather than January 23, which led Lewis to discharge Ferrari, it would follow that Ferrari would have been terminated on arriving at work on January 23, or would have been contacted at home on January 22. Weekly testified that he has discharged employees of the Respondent by phone.

Finally, Dorothy Welsh testified that about a week after Ferrari's termination, she asked Custer why this had happened and Custer ''said she had been fired because her husband had went into Linda's office and they had words or an argument. And that he had to be escorted out and that Lynette had threatened to go to the Labor Relations Board.'' Although denying this initially, Custer did admit that it was possible that she said something about the Labor Board to Welsh.

Testimony from several current employees, including Steves who was a witness for the General Counsel, suggests that Ferrari was a strong willed individual and not easy for everyone to work with. Thus Steves testified that before Kathy Johnson left in the winter of 1995–1996, Steves told Lewis that with Johnson and Ferrari together was like a ''war zone.'' While this testimony lends some credence to the Respondent's position concerning Ferrari as an employee, the fact remains that her attitude existed the entirely of her time with the Respondent. Other than confront Lewis with the before-hours pay issue, Ferrari's performance on January 23 (or January 22) was no different than it had been.

Accordingly, I conclude that the Respondent did not carry its burden of proving that Ferrari would have been discharged even if she had not brought up the pay matter. And I conclude that by discharging Ferrari, the Respondent violated Section 8(a)(1) of the Act.

2. Other alleged violations

It is alleged that on January 23 Lewis ''threatened its employees with layoff if they engaged in protected concerted activities relating to pay for time worked.'' This is alleged to have occurred when Ferrari approached Lewis on the morning of January 23.

According to Ferrari, whom I credit, in response to Ferrari's inquiry about the before hours pay Lewis said, ''listen Lynn, I'm not playing games. If you want to push this, I will lay you off. I said Linda, me and Phyllis just want to talk to you about our starting time and about getting paid for that fifteen minutes. She said I'll talk to you alone. I'll talk to Phyllis alone, but, I will not talk to you two together. She says, and I'll pay you for five minutes and no more, and I do mean it Lynn, if you want to push this, I will lay you off.''

By telling Ferrari that she would be laid off if she pursued the pay issue Lewis threatened Ferrari in violation of Section 8(a)(1) of the Act.

As noted above, I credit Welsh's testimony that about one week after Ferrari's discharge, Custer told Welsh that the discharge was caused in part because she had gone to the Labor Board. Such necessarily intimidates employees in the exercise of their right to seek protection of the Act and was therefore violative of Section 8(a)(1).

III. REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including reinstating Lynette Ferrari to her former job, or if that job no longer exists, to a substantially identical position of employment and make her whole for any loss of wages or other benefits she may have suffered in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Linda Lewis and Roger Weekly, Individually and as a Partnership d/b/a Iron Griddle Restaurant, their officers agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in concerted activity protected by the National Labor Relations Act.

(b) Threatening employees with discharge should they engage in concerted activity protected by the National Labor Relations Act.

(c) Interfering with employees rights under the National Labor Relations Act by telling them that an employee has been discharged for contacting the National Labor Relations Board.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Lynette Ferrari immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in concerted activity protected by the Act.

WE WILL NOT threaten our employees with discharge should they engage in concerted activity protected by the Act.

WE WILL NOT interfere with our employees rights under the Act by telling them that an employee has been discharged for contacting the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Lynette Ferrari immediate and full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and we will make her whole for any loss of wages or other benefits she may have suffered as a result of our discrimination against her, with interest.